

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2001 DEC 12 P 2:44

BY RONALD R. CARPENTER

80874-1

NO. 80714-1

CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

KATHIE COSTANICH,

Petitioner,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES
FOR THE STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

ROBERT M. MCKENNA
Attorney General

MICHAEL COLLINS
Assistant Attorney General
WSBA #19375
800 Fifth Avenue Suite 2000
Seattle, WA 98104
(206) 389-2095

ORIGINAL

TABLE OF CONTENTS

I.	IDENTITY OF RESPONDENT	1
II.	DECISION BELOW	1
III.	ISSUE PRESENTED FOR REVIEW	1
IV.	COUNTERSTATEMENT OF THE CASE	1
V.	REASONS WHY REVIEW SHOULD BE DENIED	3
	A. RAP 13.5(a) Sets Out the Correct Standard For Acceptance Of Review.	3
	B. The Plain Language of the EAJA Limits the Award of Attorney's Fees for Parties who Prevail in the Judicial Review of an Agency Decision.....	4
	C. The Court of Appeals Ruling Regarding Attorney's Fees is Consistent with the only Published Authority on the Subject.....	10
VI.	CONCLUSION	10

TABLE OF AUTHORITIES

Cases

<i>Alpine Lakes v. Natural Resources</i> , 102 Wn. App. 1, 979 P.2d 929 (1999).....	10
<i>Alyeska Pipeline Servs. Co. v. Wilderness Soc’y</i> , 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975).....	4
<i>Coughlin v. City of Seattle</i> , 18 Wn. App. 285, 567 P.2d 262 (1977), rev. denied, 89 Wn.2d 1015	7
<i>Davis v. Dep’t of Licensing</i> , 137 Wn.2d 957, 977 P.2d 554 (1999).....	6, 7
<i>Food Servs. of Am. v. Royal Heights, Inc.</i> , 123 Wn.2d 779, 871 P.2d 590 (1994).....	6
<i>Marine Power v. Dep’t of Transportation</i> , 102 Wn.2d 457, 687 P.2d 202 (1984).....	6
<i>State v. Fjermestad</i> , 114 Wn.2d 828, 791 P.2d 897 (1990).....	6
<i>State v. Smalls</i> , 99 Wn.2d 755, 665 P.2d 384 (1983).....	6
<i>State v. Stannard</i> , 109 Wn.2d 29, 742 P.2d 1244 (1987).....	6
<i>Tapper v. Employment Sec. Dep’t</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	5
<i>Vita Food Prods. v. State</i> , 91 Wn.2d 132, 587 P.2d 535 (1978).....	8
<i>Wagner v. Foote</i> , 128 Wn.2d 408, 908 P.2d 884 (1996).....	4

Statutes

RCW 34.05	5
RCW 34.05.510	5
RCW 34.05.510-598	5
RCW 34.05.570(3)	5
RCW 4.84.340(2)	5
RCW 4.84.340-.360	1, 4
RCW 4.84.350	2, 6
RCW 4.84.350(1)	8
RCW 4.84.350(1), (2)	5
RCW 4.84.350(2)	8

Rules

RAP 13.5(a)	3, 10
-------------------	-------

I. IDENTITY OF RESPONDENT

The Department of Social and Health Services, "Department", answers Petitioner's Motion for Discretionary Review.

II. DECISION BELOW

The Petitioner seeks discretionary review of the Court of Appeals decision which limits the amount of attorney's fees that a prevailing party can receive pursuant to the Equal Access to Justice Act ("EAJA"). RCW 4.84.340-.360. The court held that the EAJA capped attorney's fees for a prevailing party seeking judicial review of an agency decision at \$25,000.00 and that judicial review included appellate review of the agency decision. The decision of the court is attached to the Petition for Review.

III. ISSUE PRESENTED FOR REVIEW

Does the plain language of Washington's Equal Access to Justice Act, which caps attorney fees for judicial review of agency decisions, apply to appellate review of agency decisions? RCW 4.84.340-.360.

IV. COUNTERSTATEMENT OF THE CASE

The underlying appeal involves the judicial review of a final administrative decision by the Department that revoked Kathie Costanich's foster care license. The Department revoked the foster care license because of emotional and physical abuse allegations. An Administrative Law Judge ("ALJ") reversed the Department's decision.

The ALJ issued an Initial Decision overturning the Department's decision. AR at 224-48. The Department appealed this decision and the Review Judge reversed the ALJ's Initial Decision. AR at 1-80. The Review Judge concluded that there was substantial evidence to support the contention that Ms. Costanich had sworn at the children in her home and that the Department's finding of emotional abuse and the revocation of the Costanich foster license should be upheld. The Review Judge conducted an exhaustive review of the entire record and wrote an eighty (80) page opinion explaining his decision. AR at 1-80.

The Review Judge determined that the allegations were supported by evidence in the record. This conclusion was based on the admissions of Costanich and a careful comparison of each child's statements with statements by adult witnesses. AR at 4-10, 23-51.

Costanich filed a Petition for Judicial Review in Superior Court, which reversed the final administrative decision of the Department and awarded her attorney's fees pursuant to The Equal Access to Justice Act, RCW 4.84.350. The Department appealed the Superior Court decision. The Court of Appeals upheld the decision of the Superior Court on January 29, 2007 but denied attorney's fees to Costanich. On May 3, 2007 the Court of Appeals amended the opinion to include an award of attorney's fees pursuant to RCW 4.84.350. A Commissioner awarded

Costanich \$46,239.00 in attorney's fees. The Department filed a Motion to Modify because the plain language of the statute does not allow attorney's fees for a prevailing party to exceed a total of \$25,000.00. The Court of Appeals granted the motion.

V. REASONS WHY REVIEW SHOULD BE DENIED

The Court of Appeals decision is a simple, correct reading of an unambiguous statute. The EAJA clearly provides for the award of a limited amount of attorney's fees when a party prevails in the "judicial review" of an agency decision. The Superior Court, the Court of Appeals and the Supreme Court are all part of the judicial system and review by any level constitutes judicial review. The Petitioner's strained interpretation of an unambiguous statute would eviscerate the clear dollar limits on attorney's fees set by the Legislature.

A. RAP 13.5(a) Sets Out the Correct Standard For Acceptance Of Review.

This matter is a Motion for Discretionary Review and governed by RAP 13.5(a). As shown below, the Court of Appeals did not commit obvious error, nor did it commit probable error that alters the status quo or limits the freedom of a party to act. Finally, the Court of Appeals did not depart from the accepted and usual course of judicial proceedings in a manner which requires intervention by the Supreme Court. Costanich did not

even address these criteria.

B. The Plain Language of the EAJA Limits the Award of Attorney's Fees for Parties who Prevail in the Judicial Review of an Agency Decision.

Under the American rule regarding attorney's fees each party bears his or her own litigation costs. *See Alyeska Pipeline Servs. Co. v. Wilderness Soc'y*, 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975). Attorney's fees are not generally recoverable absent specific statutory authority, contractual provision, or recognized ground in equity. *Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996).

Washington's EAJA authorizes qualified parties that prevail in judicial review of administrative decisions to receive a *limited* amount of attorney's fees when an agency action is not substantially justified. RCW 4.84.340-.360. The EAJA, in relevant part, states:

(1) Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a *judicial review* of an agency action fees and other expenses, including reasonable attorney's fees, unless. . .

(2) The amount awarded a qualified party under subsection (1) of this sections *shall not exceed* twenty-five thousand dollars. Subsection (1) of this section shall not apply unless all parties challenging the agency action are qualified parties. If two or more qualified parties join in an action, the award in total shall not exceed twenty-five thousand dollars. The court, in its discretion, may reduce the amount to be awarded pursuant to subsection (1) of this section, or deny any award, to the extent that a qualified party during the course of the proceedings engaged in conduct that unduly or unreasonably

protracted the final resolution of the matter in controversy.

RCW 4.84.350(1), (2). (emphasis added).

The statute defines “Judicial Review” as a “judicial review as defined by chapter 34.05.” RCW 4.84.340(2). RCW 34.05 is the Administrative Procedure Act (APA). Part V of the APA is titled “Judicial Review and Civil Enforcement.” The first sentence states that “[t]his chapter established the exclusive means of *judicial review* of agency action . . .” RCW 34.05.510 (emphasis added). The chapter provides the basic information necessary to obtain judicial review of an agency decision: how to file a petition for judicial review, where to file it, the standard for review, how to obtain direct review by the Court of Appeals and how to obtain appellate review in general. See RCW 34.05.510-598. The judicial review chapter encompasses all levels of judicial review: Superior Court, Court of Appeals and Supreme Court. There is one section titled “judicial review” which sets out the standards for reviewing an agency decision. RCW 34.05.570(3). Each court, at every level, applies these standards directly to the final administrative decision of the agency.¹

¹ This court has held that “[i]n reviewing administrative actions, [the appellate] court sits in the same position as the superior court, applying the standards of the APA *directly* to the record before the agency.” *Tapper v. Employment Sec. Dep’t*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). (emphasis added).

The most basic principles of statutory interpretation support the Court of Appeals' decision limiting attorney's fees to a total of \$25,000 for all stages of judicial review. Statutes are to be interpreted as they are plainly written, unless a literal reading would contravene legislative intent by leading to a strained or absurd result. *Marine Power v. Dep't of Transportation*, 102 Wn.2d 457, 461, 687 P.2d 202 (1984). In interpreting statutes, courts do not construe a statute that is unambiguous. *Food Servs. of Am. v. Royal Heights, Inc.*, 123 Wn.2d 779, 784-85, 871 P.2d 590 (1994) *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999). "In judicial interpretation of statutes, the first rule is: 'the court should assume that the legislature means exactly what it says.'" *Davis*, 137 Wn.2d at 964 (citations omitted). It is a basic tenet of statutory construction that statutes and rules are to be given a rational and sensible construction. *State v. Smalls*, 99 Wn.2d 755, 766, 665 P.2d 384 (1983). Unlikely, absurd or strained results are to be avoided. *State v. Stannard*, 109 Wn.2d 29, 6, 742 P.2d 1244 (1987); *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990).

The plain language of RCW 4.84.350 states that parties have a right to receive a limited award of attorney's fees for prevailing in a judicial review action. The statute does not define judicial review as a superior court judicial review. The simple conclusion is that the

legislature meant judicial review to include all levels of such review. Costanich is requesting that this Court interpret the language "judicial review" to mean superior court review. Courts cannot read into a statute words which are not there. *Coughlin v. City of Seattle*, 18 Wn. App. 285, 567 P.2d 262 (1977), *rev. denied*, 89 Wn.2d 1015.

If the legislature had intended the limitation of an award of attorney's fees to apply only to Superior Court review and to allow unlimited awards for further appellate review, it would have been quite simple to articulate that intent in the statute. Instead, the legislature chose to use the more general language of "judicial review." This general language is also what is used in Part V of the APA to describe the method of reviewing agency decisions in Superior Court and in the Court of Appeals.

Costanich's interpretation would also lead to an absurd result. A petitioner could prevail in Superior Court and lose in the Appellate Court but still collect attorney fees - even though they ultimately lost. This would be the result of looking at each judicial stage independently.

It is a cardinal principle of statutory construction that when the language of a statute is plain and unambiguous, the legislature is presumed to mean "exactly what it says." *Davis*, 137 Wn.2d at 964. Moreover, courts do not have the power to add words to a statute even if they believe

the legislature intended something else but failed to express it adequately. *Vita Food Prods. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). Costanich is requesting that this Court ignore the plain meaning of the phrase “judicial review” that the legislature wrote into the statute and to change the meaning completely by adding the phrase by superior court. Costanich also chooses to ignore the legislature’s clear declaration that fees “shall not exceed twenty-five thousand dollars.” This Court should refuse the request to amend the statute by judicial fiat and to eliminate the limitation on attorney’s fee awards that is specifically prescribed by the statute.

The legislature could have delineated the changes that the Petitioner seeks in this action. The legislature did craft some exceptions to the awarding of fees, but not the one that the Petitioner seeks. The legislature made provisions for instances when the court could decide not to award fees. RCW 4.84.350(1) [when an award is unjust or the agency action is substantially justified]. It also allows a court to reduce or deny an award of attorney’s fees when a prevailing party engages in certain conduct which unreasonably protracts litigation. RCW 4.84.350(2). Additionally, the legislature clearly capped attorney’s fees at \$25,000.00, even when there are two prevailing parties. RCW 4.84.350(2). Under those circumstances the prevailing parties must share the amount of \$25,000.00. *Id.* There is,

however, no language in the statute that allows the court, under any circumstances, to exceed the cap of \$25,000.00 in attorney's fees.

Costanich claims, without any legislative support whatsoever, that there should be a limit on the amount of superior court fees but absolutely no limitation on appellate fees. There is no indication in the statute that this was the legislative intent. Costanich suggests reasons as to why this would be a good policy – but this is the domain of the legislature and not the Petitioner. There are equally valid reasons why the legislature chose to limit the attorney's fees including the fact that it was waiving sovereign immunity, that it was creating a limited exception to the usual rule of parties bearing the burden of their expenses in litigation, and the fear that attorneys would seek excessive awards.²

Costanich's argument that parties would be deterred from defending their superior court victories is belied by this very case: Costanich did defend and did win. She provides no examples of cases where parties who won in superior court were unable to defend in the court of appeals. The lack of cases addressing the issue of fees is significant because it is a strong indication that the legislature's general rule, while perhaps not perfect, has allowed the access to the judicial system that was the intent of the Act.

² If the legislature were to look at this specific case it would also have to take note of the fact that the Petitioner has a tort action pending in federal court against the Department based on the revocation of her license, and that it would be difficult to separate the litigation costs of the two separate but intertwined actions.

C. The Court of Appeals Ruling Regarding Attorney's Fees is Consistent with the only Published Authority on the Subject.

The single published opinion on this subject recognized and applied the plain meaning of the EAJA statute. In *Alpine Lakes v. Natural Resources*, 102 Wn. App. 1, 979 P.2d 929 (1999) the court held that “we also award attorney fees on appeal to Alpine Lakes in such reasonable sum as shall be awarded by the trial court in light of our partial reversal and partial affirmance of the superior court’s rulings, *the total fees for judicial review* and the trial and court of appeals levels *not to exceed the statutory cap of \$25,000.00.*” *Id.* at 20 (emphasis added). It is not necessary to interpret the plain language of the EAJA statute regarding attorney’s fees. The Court in *Alpine Lakes* held that the plain language of the statute permits a limited award of attorney’s fees for prevailing in a judicial review action. The statute is clear and unambiguous and is easily understood by all parties who look at it. The statute provides access to the judicial system but not the unlimited access to attorney’s fees that the Petitioner seeks.


VI. CONCLUSION

Because Petitioner does not meet the requirements of RAP 13.5(a), DSHS respectfully requests that the Supreme Court deny Costanich’s Motion for Discretionary Review.

The motion does not meet the standards set out in the Rules of Appellate Procedure and this issue does not qualify for review by the Supreme Court.

RESPECTFULLY SUBMITTED this 11th day of December, 2007.

ROBERT M. MCKENNA
Attorney General

By 
MICHAEL COLLINS
WSBA #19375
Assistant Attorney General